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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FIONA HARVEY,

Plaintiff,

V.

NETFLIX, INC. and NETFLIX
WORLDWIDE ENTERTAINMENT, LLC,

Defendants.

Case No. 2:24-cv-04744-RGK-AJR

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: September 16, 2024

Time: 9:00 a.m.

Place: Courtroom 850

Hon. R. Gary Klausner

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1 PRELIMINARY STATEMENT

2 Netflix defamed Fiona Harvey in its unrestrained pursuit of adding more
3 subscribers to its streaming service. Compl., ¶ 11. The scale and scope of Netflix's
4 defamation is unprecedented. Netflix represented to 56 million viewers of its series,
5 *Baby Reindeer* (the "Series"), that Fiona Harvey was a twice convicted stalker who
6 served five years in prison, and that she raped Richard Gadd, smashed his head,
7 waited outside home for 16 hours a day and stalked a police officer. Compl., ¶ 88.
8 Netflix made it clear that all of this was "true" not only in the first minutes of the
9 Series on a black screen on which only these words "this is a true story" appeared,
10 but also in promotional materials on its website, social media posts, and even during
11 hearing in Parliament. Compl., ¶¶ 23, 73, 77.

12 But, the truth caught up with Netflix. In response to a demand by Member of
13 Parliament, John Nicholson, for evidence of Netflix's "serious claims" about
14 Harvey's convictions, Netflix confessed it was all made up. Levenson Decl., ¶ 5,
15 Exh. 3. But, for Netflix, that was a small price to pay. Netflix enjoyed a gangbuster
16 second quarter because of its new hit series, *Baby Reindeer*, and added millions of
17 subscribers.

18 Meanwhile, Fiona Harvey's life has literally been destroyed. As a result of
19 Netflix's calculated decision to falsely tell 56 million people that Harvey was a head
20 smashing, rapist, who was twice convicted and imprisoned for five years, Harvey
21 received death threats and a non-stop stream of messages from members of the
22 public who wanted to confront the monster in *Baby Reindeer*. Compl. ¶¶ 37, 42. As
23 a direct result, Harvey has experienced chest pains, panic attacks, insomnia, and
24 general fear of going outside. Compl., ¶¶ 43-44.

25 Netflix, not satisfied with having added millions of subscribers, now seeks to
26 dismiss Harvey's Complaint, primarily on the basis that Netflix was careful not to
27 use Harvey's real name when it destroyed her life. As demonstrated herein, Netflix's

position has no merit. The motion must be denied and Netflix must be held accountable for destroying Fiona Harvey's life for the sake of adding subscribers.

BACKGROUND

4 In the Netflix series *Baby Reindeer* (the “Series”): (1) Martha was convicted of
5 stalking a barrister with a disabled child and served a four-and-a-half-year sentence;
6 (2) Martha pled guilty and was a convicted stalking a second time and was sentenced
7 to a nine-month sentence for stalking Gadd; (3) Martha cornered Gadd in a dark alley
8 and raped him by grabbing his penis until he ‘beated’; (4) Martha gouged Gadd’s
9 eyes with her thumbs and smashed a glass over his head leaving him bloodied; (5)
10 Martha waited outside Gadd’s residence 16 hours a day; and (6) Martha stalked a
11 policeman. Compl., ¶ 88.

12 The public understood that the real ‘Martha’ did these monstrous things for
13 good reason. Episode One of *Baby Reindeer* begins with a black screen on which the
14 words “this is a true story appear.” Compl., ¶ 23. Netflix promoted *Baby Reindeer*
15 on its website, with an article about the Series that states, “it’s important to
16 remember that this isn’t just a story – it’s true.” Compl., ¶ 73; Levenson Decl., ¶ 4,
17 Exh. 2. Netflix promoted the Series on Facebook and Twitter with a post viewed by
18 millions purporting to show Harvey’s real emails, titled, “Martha’s Real Emails from
19 Baby Reindeer – Every One of Them Is Real.” Levenson Decl., ¶ 9, Exh. 7.

20 The only question then was, who was the real Martha? That question was
21 answered just days after Netflix released the Series. Compl., ¶ 36. The answer was
22 plaintiff, Fiona Harvey. Harvey, like Martha, are Scottish lawyers, twenty years older
23 than Gadd, living in London, with identical accents, cadence, and physical
24 appearance, who both were accused in newspapers of stalking a barrister, and who
25 messaged Gadd with the unusual euphemism for sex, “my curtains need hung badly.”
26 Compl., ¶ 33, 40-41. There is no question that Harvey is ‘Martha.’

1 On May 8, 2024, during a committee hearing in the House of Commons,
2 Netflix stated that “*Baby Reindeer* is obviously a true story of the horrific abuse that
3 [Richard Gadd] suffered at the hands of a convicted stalker [Fiona Harvey].”
4 Compl., ¶ 77; Levenson Decl., ¶ 3, Exh. 1, at Q401 (p. 32). In response to Netflix’s
5 unequivocal statement, Member of Parliament, John Nicholson sent a follow up
6 written demand for evidence supporting Netflix’s “serious claim,” particularly, since
7 “journalists have thus far been unable to find a record of the conviction.” Compl., ¶
8 79. MP Nicholson’s demand was significant in that it demonstrated members of
9 Parliament and journalists believed Netflix’s statement that ‘this is a true story’ and
10 searched for records of Harvey’s convictions. On May 28, 2024, in response to MP
11 Nicholson’s demand, Netflix provided a signed letter in which it confessed that “the
12 person upon whom the show is based” was never convicted. Levenson Decl., ¶ 5,
13 Exh. 3.

14 Now, Netflix moves to dismiss Harvey’s Complaint on the basis that it
15 technically did not defame Harvey because Harvey’s real name was not used in the
16 Series, and Harvey is a public figure with a reputation so low that she is incapable of
17 being defamed. Nonsense. As a matter of Ninth Circuit law, a person need not be
18 named to be defamed. And as a matter of fact, Harvey is a private person who has
19 never been convicted of any crime. Compl., Exh. 1. Regardless, discovery will show
20 that Netflix acted with actual malice, and indeed it continues to do so by continuing
21 to stream Baby Reindeer to more than 50 million people with the representation “this
22 is a true story” *after* Netflix conceded that the “person upon whom the show is
23 based” was never convicted. Netflix’s motion must be denied.

24 **STANDARD ON A MOTION TO DISMISS**

25 A federal court cannot dismiss a complaint for failure to state a claim unless it
26 appears beyond doubt that the plaintiff can prove no set of facts in support of his
27 claim which would entitle him to relief. *Moore v. City of Costa Mesa*, 886 F.2d 260,

1 262 (9th Cir.1989). The allegations contained in the complaint must be construed in
2 the light most favorable to the plaintiff, and all material allegations in the
3 complaint—as well as any reasonable inferences to be drawn from them—must be
4 accepted as true. *Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 96
5 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
6 Cir.1986).

7 On a motion to dismiss, a court generally limits its review to the face of the
8 complaint. See *Van Buskirk v. Cnn*, 284 F.3d 977, 980 (9th Cir. 2002). There are two
9 exceptions to this rule. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
10 2001). First, the Court may take judicial notice of any material submitted as part of
11 the Complaint, and if the material is not physically attached to the Complaint, so
12 long as “its authenticity is not questioned” and the Complaint “necessarily relies on
13 them.” *Id.* Second, the Court may take judicial notice of matters in the public record
14 under Fed. R. Evid. 201. *Id.*

15 **ARGUMENT**

16 **POINT I**

17 **HARVEY STATED A CLAIM FOR DEFAMATION**

18 To state a claim for defamation, “the complaint need only plead facts to show
19 that [Defendant’s] remarks can reasonably be understood to refer to Plaintiff.” *Miller*
20 *v. Sawant*, 18 F.4th 328, 337 (9th Cir. 2021). A plaintiff may “plead extrinsic facts to
21 show that [the] statements were “of and concerning” them.” *Miller v. Sawant*, 811
22 Fed.Appx.408, n.3 (9th Cir. 2020).

23 Netflix’s statements that it was true that the ‘real Martha’ was a twice
24 convicted criminal who served five years in prison, reasonably can be understood to
25 refer to Harvey because ‘Martha’ has the identical personal history, occupation,
26 nationality, residence, physical appearance, accent, cadence, phraseology, messages
27 Gadd (“hang my curtains”), and was also once accused of stalking a barrister with a

1 disabled child, as Harvey. Compl., ¶¶ 40-41. Harvey was identified as ‘Martha’ by
2 the public based on the obvious idiosyncratic facts about Harvey referenced in the
3 Series (above), in particular the “hang my curtains” tweet to Gadd. Compl., ¶ 35.

4 **A. The Public Reasonably Believed Netflix’s False Statements Were True**

5 Netflix argues that the Complaint fails to allege that a reasonable viewer
6 would understand the statements in the Series to be factual, especially in light of a
7 disclaimer in each episode. Netflix Br. at 8. Netflix’s position is pure gaslighting.
8 Within two minutes of Episode One, Netflix tells viewers in a clear affirmative
9 statement, a title screen, “this is a true story.” Compl., ¶ 23.

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11

12 Further, Netflix promoted the series as a “true story.” ¶ 71-73. Netflix
13 unequivocally stated in its promotion, “it’s important to remember that this isn’t just
14 a story – it’s true.” Compl., ¶ 73; Levenson Decl., ¶ 4; Exh. 2. The Complaint
15 alleges the public believed it was true as evidenced by the hate mail and death threats
16 that Harvey received from members of the public who reasonably believed Harvey
17 was the real ‘Martha.’ Compl., ¶ 37.

18

19 **1. Fictional Works Can Defame Real People**

20

21 Netflix’s passing argument that no reasonable person would think its
22 statements about Harvey were true because Netflix used of “dramatic and cinematic
23 devices” is unavailing. Netflix Br. at 7. *Gaprindashvili v. Netflix, Inc.*, 2022 WL

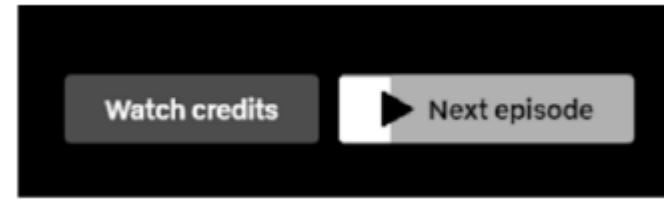
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1 363537, *5 (C.D.Cal. 2022) (“the fact that the Series was a fictional work does not
2 insulate Netflix from liability for defamation if all the elements of defamation are
3 otherwise present.”) (citing *Bindrim v. Mitchell*, 92 Cal. App. 3d 61 (1979), cert.
4 denied, 444 U.S. 984 (1979) (fictional character in the novel was identifiable as the
5 real person). See *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995) (creators
6 of docudramas that mix fact and fiction “must attempt to avoid creating the
7 impression that they are asserting objective facts”). Here, the Complaint is clear that
8 in addition to the hate mail Harvey received from members of the public, Members
9 of Parliament and journalists believed Netflix’s statements were true and searched
10 for records of Harvey’s convictions. Compl., ¶¶ 37, 79.

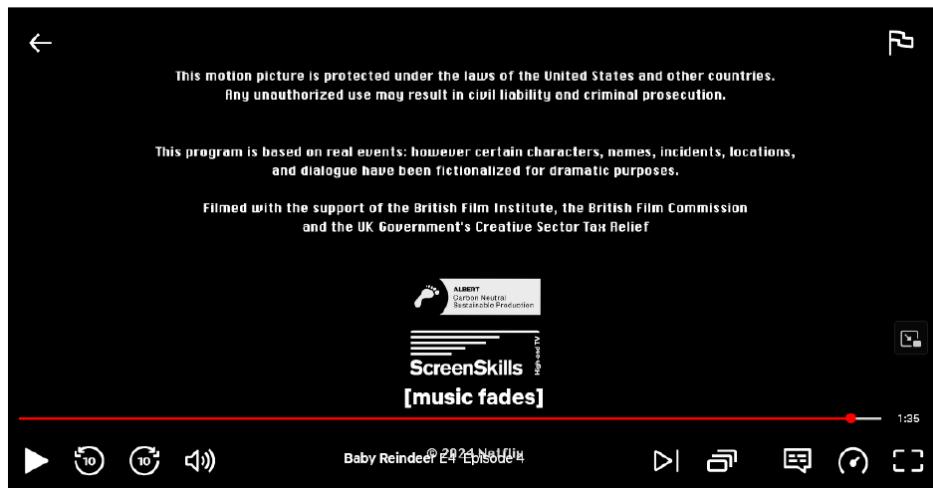
11 **2. Netflix’s Argument About Its Disclaimer is Improper and Unavailing**

12 Netflix argues that the Series could not be understood as depicting real events
13 because each episode had a disclaimer. Netflix Br., at 18. Netflix has tried, and
14 failed, to assert the same disclaimer defense in other litigations. See *Gaprindashvili*
15 at *6 (C.D.Cal. 2022) (rejecting Netflix’s disclaimer and holding “in context,
16 therefore, Netflix created the impression that it was asserting objective facts.”);
17 *Fairstein v. Netflix, Inc.*, 553 F.Supp.3d 48, 59 (S.D.N.Y. 2021) (statements in
18 Netflix docudrama were actionable notwithstanding a disclaimer that appeared in
19 each episode). See also *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918 (7th
20 Cir. 2003) (defamation claim stated notwithstanding disclaimer “this is a fictitious
21 story and no actual persons . . . have been portrayed.”).

22 Here, the entire premise of the Series is that “this is a true story.” Compl., ¶
23 23. Netflix’s disclaimer buried in credits minutes after the episode already ended
24 does nothing to change the impression that Netflix was asserting objective facts.
25 Moreover, when the Series is streamed on the Netflix platform (as opposed to the
26 thumb drive Netflix provided the Court), the disclaimer does not appear unless the
27 viewer proactively clicks the “Watch Credits” option at the end of the episode.



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5 If “Watch Credits” is not selected, the next episode automatically begins to play.
6 Finally, even if “Watch Credits” is selected, the disclaimer is fine print buried
7 halfway through the credits.



16 **B. Netflix’s Defamatory Statements are Not Opinion**

17 Netflix argues its false statements about Harvey were non-actionable opinions.
18 Netflix Br., at 15. Netflix made this same failed argument in other litigations, and it
19 must fail here as well. See *Fairstein v. Netflix, Inc.*, 553 F. Supp.3d 48, 58 (S.D.N.Y.
20 2021), (“[t]he average viewer could conclude that these scenes have a basis in fact
21 and do not merely reflect the creators’ opinions about controversial historical
22 events.”); *Colborn v. Netflix Inc.*, 541 F. Supp. 3d 888, 901 (E.D. Wis. 2021)
23 (Netflix’s implication that plaintiff criminally framed Avery for murder was not a
24 nonactionable opinion). Netflix asserted cold hard facts in the true story about
25 Harvey – the eye gouging, head smashing monster, who raped Gadd, got convicted
26 (twice), and served five years in prison. See *Toufanian v. Oreffice*, 2021
27 WL4353115, *5 (C.D.Cal. 2021) (statements of opinion are “broad, unfocused, and

1 wholly subjective.”). Regardless, “a statement that implies a false assertion of fact,
2 even if couched as an opinion, can be actionable.” *Dickinson v. Cosby*, 37
3 Cal.App.5th 1138 (2019).

4 **C. Harvey Is Not Libel-Proof**

5 A plaintiff is libel-proof when he is “so unlikely by virtue of his life as a
6 habitual criminal to be able to recover anything other than nominal damages as to
7 warrant dismissal of the case, involving as it does First Amendment considerations.”
8 *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639 (2d Cir.1975). A determination
9 of libel-proof “[d]epend[s] upon the nature of the conduct, the number of offenses,
10 and the degree and range of publicity received.” *Wynberg v. National Enquirer, Inc.*,
11 564 F.Supp. 924, 928 (C.D.Cal.1982). The passage of time and geographical distance
12 from when and where press coverage existed are also relevant factors. *Von Kahl v.*
13 *Bureau of Nat. Affairs, Inc.*, 934 F.Supp.2d 204, 215 (D.C. 2013).

14 Harvey is not libel-proof because there is no allegation in the four corners of
15 the Complaint that Harvey has ever committed any crime. It is just the opposite. The
16 Complaint confirms with a certified background check with the United Kingdom that
17 Harvey has no criminal record. Complt., ¶ 52, Exh. 1.

18 Netflix relies on articles it found on the Internet that were purportedly
19 published more than twenty years ago in Scotland (Harvey resides in London), and
20 that are outside the four corners of the Complaint to prove Harvey is libel proof. This
21 is improper on a motion to dismiss. Putnam Decl., Exhs. M, T. Regardless, one
22 article relied on by Netflix refers to Harvey with a different surname “Muir.” Netflix
23 Exh. B (ECF 28-5). It is unlikely anyone would connect that article to Harvey. The
24 articles do not accuse of Harvey of criminal convictions, sexually assault or violent
25 physical attacks, as Netflix represented in *Baby Reindeer*. Complt., ¶¶ 88. There is no
26 indication anyone has seen these articles in twenty years or read them. Even if these
27 articles were known, Netflix’s over the top false statements that Harvey is an eye-

1 gouging, head smashing, convicted criminal, and rapist, plainly did more to damage
2 Harvey's reputation than articles Netflix dug up on the Internet. Harvey is not libel-
3 proof.

4 **POINT II**

5 **HARVEY IS NOT A PUBLIC FIGURE**

6 “At the pleading stage, a determination of whether a plaintiff is a public figure
7 is made from allegations in the complaint itself or from documents properly noticed.”
8 *Toufanian v. Oreffice*, 2021 WL4353115, *4 (C.D.Cal. 2021). The determination of
9 whether Plaintiff is a public figure is a question of law. *Rosenblatt v. Baer*, 383 U.S.
10 75, 88 n. 15, 86 S.Ct. 669, 677 n. 15, 15 L.Ed.2d 597 (1966). As the moving party,
11 the defendant bears the burden of showing plaintiff is a public figure. *Unsworth v.
12 Musk*, 2019 WL 8220721, *4 (C.D.Cal. 2019). “Absent clear evidence of general
13 fame or notoriety in the community, and pervasive involvement in the affairs of
14 society, an individual should not be deemed a public personality for all aspects of his
15 life.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997, 3013 (1974).

16 The Complaint merely alleges Harvey is a lawyer with no criminal history.
17 Complt. ¶¶ 41, 52; Exh. 1. There is no allegation Harvey is a public figure or famous.
18 Netflix does not provide any noticeable documents stating otherwise. The two
19 newspaper articles Netflix dug up on the Internet that report of an accusation that
20 Harvey stalked another person, were published more than twenty years ago in
21 another country. That is insufficient to make Harvey a public figure. See *Wolston v.
22 Reader's Digest Ass'n., Inc.*, 443 U.S. 157, 167, 99 S.Ct. 2701, 2707 (1979) (“[a]
23 private individual is not automatically transformed into a public figure just by
24 becoming involved in or associated with a matter that attracts public attention.”).
25 Regardless, “a public figure can be so far removed from his former position in the
26 public eye, that the publisher will no longer enjoy the prophylactic treatment
27 accorded him when he deals with those persons who truly are public officials or

1 public figures.” *Briscoe v. Reader’s Digest Association Inc.*, 4 Cal.3d 529, n. 13
2 (1971) (en bank).

3 **A. Harvey Is Not A Limited Public Figure**

4 Three elements must be present in order to characterize a plaintiff as a limited
5 purpose public figure: (1) there must be a public controversy, which means the issue
6 was debated publicly and had foreseeable and substantial ramifications for
7 nonparticipant; (2) the plaintiff must have undertaken some voluntary act through
8 which he or she sought to influence resolution of the public issue. In this regard it is
9 sufficient that the plaintiff attempts to thrust him or herself into the public eye; and
10 (3) the alleged defamation must be germane to the plaintiff’s participation in the
11 controversy. *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1577 (2005).

12 Netflix argues that Harvey is a limited public figure because she “voluntarily
13 injected herself into a public controversy, namely stalking and harassment of various
14 individuals.” Netflix Br. at 10. First, these purported events reported in articles
15 outside the Complaint, occurred 25 years ago. See *Briscoe* at n. 12 (““It would be a
16 crass legal fiction to assert that a matter once public never becomes private again.”).
17 Further, the mere fact they were reported in article does not make Harvey a public
18 figure. *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 167, 99 S.Ct. 2701,
19 2707 (1979) (“[a] private individual is not automatically transformed into a public
20 figure just by becoming involved in or associated with a matter that attracts public
21 attention.”).

22 Second, Harvey’s purported stalking of “various individuals” was never a
23 “public controversy” defined in law as an “issue that was debated publicly and had
24 foreseeable and substantial ramifications for nonparticipants.” *Ampex* at 1577.
25 Netflix does not contend Harvey’s conduct affected any nonparticipants.

26 Third, Netflix fails to identify any voluntary act by Harvey by which she
27 sought to influence the public on any issue. *Ampex* at 1577. The full extent of

1 Harvey's public involvement was purportedly being quoted as stating "I'll be
2 contacting my solicitor." Netflix Exh. B. (ECF 28-5). Finally, the purported articles
3 from the late 1990s are not germane to Netflix's false statements in 2024 that Harvey
4 raped Gadd, attacked Gadd, was convicted twice and served five years in prison.
5 *Ampex* at 1577. Accordingly, Netflix has failed to satisfy any prong of three-part
6 limited public figure analysis.

7 **B. Netflix Had Actual Malice**

8 'Actual malice' means that the defamatory statement was made with
9 knowledge that it was false or with reckless disregard of whether it was false or not."
10 *Khawar v. Globe Intern., Inc.*, 19 Cal.4th 254, 275 (1998). Reckless disregard, in
11 turn, means that the publisher in fact entertained serious doubts as to the truth of his
12 publication." *Id.* (internal citation omitted). To prove actual malice, therefore, a
13 plaintiff must demonstrate with sufficient evidence that the defendant realized that
14 his statement was false or that the subjectively entertained serious doubts as to the
15 truth of his statement." *Id.* To prove this culpable mental state, the plaintiff may rely
16 on circumstantial evidence, including evidence of motive and failure to adhere to
17 professional standards. *Id.* at 275. When a finding of actual malice is based on the
18 republication of a third party's defamatory falsehoods, the actual malice finding may
19 be upheld 'where there are obvious reasons to doubt the veracity of the informant
20 and the republisher failed to interview obvious witnesses who could have confirmed
21 or disproved the allegations. *Id.*

22 Actual malice is easily established because Netflix's letter to UK Parliament
23 confirms that Netflix knows Harvey is not a convicted stalker, yet Netflix continues
24 to knowingly publish *Baby Reindeer* with the representation of fact she is a *twice*
25 convicted stalker. Levenson Decl., ¶ 5, Exh. 3. It, thus, knew its statements were
26 untrue. Second, there are obvious reasons to doubt Gadd's "true story" as Gadd is a
27 self-admitted, crack, meth and heroin user who would anything, including prostitute

1 himself to a TV producer, for “a little peep at fame.” Compl., ¶¶ 25, 47-48. Third,
2 according to the Complaint – and as will be proven at trial -- Netflix took Gadd’s
3 story and decided to turn it into a “true story.” Fourth, Netflix testified before
4 Parliament not that the story was “fictionalized,” as it argues in its motion, but that it
5 was “obviously true.” In short, there is ample evidence of malice to allow the matter
6 to proceed to discovery.

7 **POINT III**

8 **HARVEY’S CLAIMS ARE NOT DUPLICATIVE**

9 Harvey’s common law and statutory right of publicity claims are not
10 duplicative of her defamation claims because they arise from wholly separate facts,
11 i.e., Netflix’s unauthorized use of Harvey’s likeness, as opposed to Netflix making
12 false statements about Harvey. See *Sears v. Russell Road Food and Beverage LLC*,
13 460 F.Supp.3d 1065, 1072 (D.Nev. 2020). Netflix cites no case to the contrary. In
14 addition, Harvey’s negligence claims are not duplicative because they also arise from
15 different allegations – the failure to conceal Harvey’s identity or confirm outrageous
16 allegations against her from an attention starved drug user who will do anything for a
17 peep at fame. Compl. ¶¶ 24-26, 37; 105-109. See *Winter v. G.P. Putnam’s Sons*, 938
18 F.2d 1033, n. 9 (9th Cir. 1991) (suggesting a plaintiff alleging libel could also sue a
19 publisher for negligence). While a claim for IIED can be duplicative of one for
20 defamation, Harvey’s IIED claim arises from non-defamatory conduct. Specifically,
21 Netflix’s failure to conceal Harvey’s identity when making false, unconfirmed and
22 explosive allegations from a crack, meth and heroin user with a history of lying to
23 authorities, before broadcasting them to 50 million people. Compl. ¶¶ 24-26, 37;
24 105-109.

POINT IV

HARVEY'S INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS CLAIM IS STATED

4 To state a claim for intentional infliction of emotional distress the Complaint
5 must allege (1) extreme and outrageous conduct by the defendant with the intention
6 of causing, or reckless disregard of the probability of causing, emotional distress; (2)
7 the plaintiff's suffering severe or extreme emotional distress; and (3) actual and
8 proximate causation of the emotional distress by the defendant's outrageous conduct.
9 *Ely v. Wal*Mart, Inc.*, 875 F.Supp. 1422 (C.D.Cal. 1995). "Outrageous" as used in
10 the analysis means, i.e., "conduct so extreme as to exceed all bounds of that usually
11 tolerated in a civilized society."

12 The Complaint alleges that Netflix created a “true” show about Plaintiff in
13 which she is falsely depicted as a convicted criminal, violently gouging Gadd’s eyes,
14 and raping Gadd in a dark alley, and streamed it to *50 million people*. Compl., ¶ 91,
15 109; Levenson Decl., ¶ 5; Exh. 3 (“the person on whom the show is based . . . was
16 subject to a court order rather than a conviction.”). Netflix’s conduct is not only
17 outrageous, but unprecedented. For perspective, In *Ely v. WalMart, Inc.*, the
18 plaintiff’s allegation that her former employer, WalMart, falsely represented to
19 Woman’s World Shops, by whom the plaintiff had been offered a job, that plaintiff
20 was then involved in litigation with WalMart, was held to be sufficiently outrageous.
21 Id. at 1439-1440. See also *Belen* (IIED claim stated where plaintiff’s areolas, but not
22 breasts, were blurred in reality-television show).

23 Netflix’s claim that Harvey is to blame for her own emotional distress is
24 factually wrong and grotesque. Netflix Br. at 13. Harvey was identified by the press
25 and members of the public within days of Baby Reindeer’s release and weeks before
26 she agreed to be interviewed to rebut Netflix’s claims about her. Compl., ¶ 37.
27 Harvey received disturbing direct communications from thousands of strangers about

1 ‘Martha’ including some who told called her a rapist. Complt., ¶ 37. Harvey also
2 received death threats that were “liked” on social media by *thousands* of people.
3 Complt., ¶ 42. As a result of these communications from the public, Harvey became
4 afraid to go outside or read the news; she suffered from panic attacks, extreme stress,
5 sickness, fear, and has gone days without leaving her home. Complt., ¶ 43. Harvey
6 has pled an IIED claim.

7 **POINT V**

8 **HARVEY’S NEGLIGENCE CLAIM IS STATED**

9 “Under general negligence principles...a person ordinarily is obligated to
10 exercise due care in his or her own actions so as not to create an unreasonable risk of
11 injury to others.” *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703, 716 (2001). It
12 is “well established” that one’s general duty to exercise due care includes the duty not
13 to place another person in a situation in which the other person is exposed to an
14 unreasonable risk of harm through the reasonably foreseeable conduct of a third
15 person. *Id.* Netflix’s failure to conceal Harvey’s identity created an unreasonable and
16 foreseeable risk of injury to Harvey by outraged viewers wanting vengeance for
17 Gadd. Complt. ¶¶ 37; 107-109.

18 In addition, Netflix’s failure to confirm the details of the inflammatory
19 allegations about Harvey in its unqualified true story was negligent. Complt., ¶ 105;
20 *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, n. 9 (9th Cir. 1991) left the door open
21 to negligence against a publisher by a plaintiff alleging libel (“[a] stronger argument
22 [for a duty owed by a publisher] might be made by a plaintiff alleging libel . . . but
23 such is not contended in this case.”). This is such a case.

24 Netflix’s decision to make the unqualified representation “this is a true story”
25 about “the person on whom the show is based” created a duty to investigate. This is
26 particularly the case, where the source material came from a self-admitted crack,
27 meth, and heroin user, with a history of lying, and doing unthinkable acts for “a little

1 peep at fame.” Complt., ¶¶ 25, 47-49. See *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 73
2 (1979) (“where the publication comes from a known reliable source and there is
3 nothing to suggest inaccuracy, there is no duty to investigate.”).

4 In addition, Netflix not only had doubts about its true story, it *knew* it was not
5 true, but continued, and *continues*, to stream it anyway. Levenson Decl., ¶ 5, Exh. 3.
6 Netflix never contacted Harvey to confirm the allegation or confirmed it without
7 governmental authority. Complt., ¶¶ 81-84. See *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992) (“Once doubt [about the accuracy of a story]
8 exists, the publisher must act reasonably in dispelling it.”) The Complaint
9 sufficiently alleges that Netflix breached its duties and that was the cause of
10 Harvey’s distress and damages. Complt., ¶ 104-110. See *Belen v. Ryan Seacrest
11 Productions, LLC*, 65 Cal.App.5th 1145, 1166 (2021) (“serious emotional distress
12 [from negligence without an accompanying personal or physical injury] may be
13 found where a reasonable person would be unable to adequately cope with the mental
14 stress engendered by the circumstances of the case”).

16 **A. Netflix is the Cause of Harvey’s Damages**

17 Netflix falsely claims that Harvey was only identified because she made a
18 public appearance on the Piers Morgan show on April 25, 2024. Netflix Br. at 14-15.
19 This is simply wrong. The Complaint alleges that Harvey was identified within days
20 of Baby Reindeer’s premiere by Netflix on April 11, 2024, and no later than April
21 21, 2024 (the date of the earliest time stamped message included in the Complaint by
22 a member of the public directly identifying Harvey as Martha). Complt., ¶ 37. This is
23 long before Harvey appeared on the Piers Morgan show on May 9, 2024, to rebut
24 Netflix’s allegations against her. Complt., ¶¶ 36-37.

POINT VI

HARVEY'S RIGHT OF PUBLICITY CLAIMS ARE STATED

3 Netflix makes two challenges to Harvey’s common law and statutory right of
4 publicity claim. Netflix Br. at 15-16. First, Netflix argues that Harvey “cannot
5 plausibly plead Netflix used Harvey’s identity” because the Series does not use
6 “historical footage of Harvey,” “her real name,” or “real events in her life.” *Id.*
7 Netflix cites no authority for these purported requirements, and that is not the law.
8 See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974);
9 *Kirby v. Sega of America, Inc.*, 144 Cal.App.4th 47 (2006). Here, it is difficult to
10 conceive of what is left for Netflix to take of Harvey’s identity that it has not already
11 used in *Baby Reindeer*. ‘Martha’ bears an uncanny resemblance to Harvey, used the
12 same phrase, “hang my curtains,” in messages to *the same person*, Richard Gadd, as
13 ‘Martha’ and has the same nationality, occupation, residence, age compared to Gadd,
14 accent, and cadence. Compl., ¶¶ 31-33, 40-41. Netflix fails to identify a single
15 difference between Harvey and Gadd.

16 Second, Netflix argues Harvey cannot allege Netflix appropriated Harvey’s
17 *identity* to its commercial advantage because Harvey did not allege her identity had
18 preexisting value. Netflix Br. at 16. However, a plaintiff is not required to provide
19 proof of preexisting commercial value or efforts to capitalize on such value in order
20 to survive a motion to dismiss. *Camacho v. Control Group Media Company*, 2022
21 WL 3093306, *28 (S.D.Cal 2022) (citing) *Motschenbacher v. R.J. Reynolds Tobacco*
22 *Co.*, 498 F.2d 821, n. 11 (9th Cir. 1974)(“the appropriation of the identity of a
23 relatively unknown person may result in economic injury or may itself create
24 economic value in what was previously valueless.”). Netflix offered *Baby Reindeer*
25 to the public as “obviously a true story of the horrific abuse that [Richard Gadd]
26 suffered at the hands of a convicted stalker.” Compl., ¶¶ 76-78; Levenson Decl., ¶ 3,
27 Exh. 1, at 32. To make the true story as true as possible, Netflix cast Richard Gadd

1 himself as the protagonist in his own “true story” of being stalked by Harvey.
2 Compl., ¶ 1, 31-33, 35, 40-41. Harvey’s identity is used in Netflix’s “true story” to
3 its commercial advantage. Compl., ¶ 1

4 **A. The First Amendment Does Not Bar Harvey’s Right of Publicity Claims**

5 Netflix also asserts that Harvey’s right of publicity claim is barred by the First
6 Amendment. Netflix Br. at 16. However, a First Amendment defense to a right of
7 publicity claim “is not absolute.” *Downing v. Abercrombie & Fitch*, 265 F.3d 994,
8 1001 (9th Cir. 2001) (reversing trial court’s grant of summary judgment); *Comedy III*
9 *Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001). The court must find
10 “a proper accommodation between [the] competing concerns of freedom of speech
11 and the right of publicity” must be found. *Downing* at 1001. In *Time, Inc. v. Hill*, 385
12 U.S. 374, 387-388 (1967), the Supreme Court held the plaintiff’s right of publicity
13 would be accommodated over concerns of freedom of speech to the extent the
14 defendant used the plaintiff’s name and likeness in an article with knowledge of, or
15 reckless disregard for, the article’s falsity, to increase circulation or enhance its
16 standing with readers. *Id.* at 387-388, 395. The Supreme Court permitted the plaintiff
17 to proceed under New York’s right of publicity statute because ““calculated
18 falsehood should enjoy no [first amendment] immunity in the situation here
19 presented us.” *Id.* at 390. The same is true, here. Netflix’s calculated falsehood with
20 respect to Harvey’s identity to gain more subscribers does not enjoy first amendment
21 immunity.

22 Netflix’s citation to *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.
23 App. 4th 318, 325 (1997) is not helpful because the Court held there was no
24 balancing to require since the character in the work of fiction was plainly not the
25 plaintiff. *Id.* at 323-324 (“[n]o person seeing this film could confuse the two.”). Here,
26 Netflix has horrifically defamed Harvey in a “true story” in which the public has not
27 only identified Harvey as ‘Martha’ but acted on it in the real world by contacting and

1 threatening her. Compl., ¶ 37. Further, the procedural posture of *Polydorous* was an
2 appeal on summary judgment, whereas the only issue on this motion is whether
3 plaintiff has stated a claim. Netflix cites no case in which a defendant's appropriation
4 of a plaintiff's identity or likeness for the purpose of defaming her was held to be
5 protected speech. Plaintiff's right of publicity claims are stated.

6 **POINT VII**

7 **HARVEY'S CLAIM FOR PUNITIVE DAMAGES
IS NOT SUBJECT TO A RULE 12(b)(6) MOTION**

8
9 Netflix's motion to dismiss Plaintiffs' punitive damages claim must be denied
10 because it is premised solely on lack of supporting factual matter, not the argument
11 that punitive damages are precluded as a matter of law. *Townsend v. McDonnell*,
12 2019 WL 7882085, *5 (C.D.Cal. 2019) (Klausner J.) (citing *Sturm v. Rasmussen*,
13 2019 WL 626167 (S.D.Cal. 2019) (Rule 12(b)(6) generally inapplicable to damage
14 prayers) (collecting cases). Here, Netflix's motion does not contend punitive damages
15 are precluded as a matter of law. Instead, Netflix argues the Complaint "sets forth no
16 factual allegations of conduct by Defendants that" support a punitive damages award.
17 Netflix Br. at 16-17. Because punitive damages are not a claim for relief, Netflix's
18 motion to dismiss for failure to state a claim is improper.

19
20 **CONCLUSION**

21 For all the reasons set forth herein, Netflix's motion to dismiss should be
22 denied in its entirety.

23
24 DATED: August 26, 2024

Respectfully submitted,

25 By: /s/ Brian Levenson

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CERTIFICATE OF COMPLIANCE

3 The undersigned, counsel of record for Plaintiff Fiona Harvey certifies that
4 this brief contains 5,530 words, which complies with the word limit of the Court's
5 standing order. In making this calculation, I have relied on the word count of the
6 word-processing system used to prepare the document.

8 | Dated: August 26, 2024

By: /s/ Brian Levenson

Brian Levenson